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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 72-1699

ROGER MUSCOLINO,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HOWARD T. SAVAGE
Suite 1015, 100 N. LaSalle Street
Chicago, Illinois 60602
AC 312 - STate 2-2131

and

ADAM BOURGEOIS
Suite 1000, 188 W. Randolph Street
Chicago, Illinois 60601
AC 312 - 332-1413

*Attorneys for Petitioner*

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-2000

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**No.**

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**ROGER MUSCOLINO,**

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VS.

**UNITED STATES OF AMERICA,**

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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To: *The Honorable Chief Justice And Associate Justices Of The United States Supreme Court:*

Petitioner, Roger Muscolino, respectfully prays that the Court issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sev-

enth Circuit affirming that he is guilty of a violation of a Federal Criminal Statute relating to duty required of him under the Military Selective Service Act of 1967 as he has been adjudged to be guilty by the United States District Court for the Northern District of Illinois, Eastern Division.

## REFERENCE TO OPINION BELOW.

The Opinion of the Court of Appeals is appended hereto. The Opinion has not yet been reported. No Petition for Rehearing was filed in the Court of Appeals.

## JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked pursuant to Rule 19-1 (b) on the ground that the Court of Appeals for the Seventh Circuit has rendered a decision that conflicts with the decisions of other courts of appeal on the same matters; has decided an important question of Federal Law which has not been, but should be settled by this court; and has decided a federal question in a way that conflicts with applicable decisions of this court, and has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The judgment of the Court of Appeals affirming Petitioner's conviction in the District Court was rendered on May 16, 1973.

No Petition for Rehearing was filed.

The Statutory Provision Conferring Jurisdiction on this Court to review the judgment in question by Writ of Certiorari is the Act of June 25, 1948, see 646, 62 Stat. 928, 28 U.S.C. Sec. 1254 (1).[1]

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(1) "Cases in courts of appeals may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of the judgment or decree." 28 U.S.C., Sec. 1254 (1).

## QUESTIONS PRESENTED.

I.

Whether there is proof of criminal intent in the failure of Petitioner to report to his local board on August 8, 1968, or within 10 days thereafter, certain facts from which it might have been inferred that he was not a member of the National Guard, and whether he has been proved guilty of a criminal offense beyond a reasonable doubt.

II.

Whether an indictment which merely charged Petitioner with failing to report to his local draft board the fact that he had not become a member of the National Guard charges a failure of performance of a duty imposed by 32 Code of Federal Regulations Sec. 1641.7 (a) so as to constitute a violation of Title 50 Appendix, United States Code, Section 462.

III.

Whether a judgment of conviction of Petitioner of failure to report to his local draft board within 10 days after August 8, 1968, that he was not a member of the National Guard can be upheld as a violation of Title 50, Appendix, Sec. 462 where the record is devoid of any evidence that any change of Petitioner's military status occurred on August 8, 1968.

IV.

Whether there is a fatal variance between the indictment and the proof where the indictment alleged that the offense was committed on January 2, 1968 and the trial court found Petitioner not guilty of the charge in the indictment, but found that the evidence showed that he was guilty of an offense on August 8, 1968.

## CONSTITUTIONAL PROVISIONS, STATUTES OF THE UNITED STATES AND SELECTIVE SERVICE REGULATIONS INVOLVED.

United States Constitution, Amendment Six:

> "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . ."

United States Constitution, Amendment Five:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . nor be deprived of life, liberty or property, without due process of law; . . ."

Title 50 United States Code, Appendix—War and National Defense, Section 462:

> § 462. *Offenses and penalties.*
>
> (a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451, 453, 454, 455, 456 and 458 to 471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making,

of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [said sections] unless such person has been actually inducted for the training and service prescribed under this title [said sections] or unless he is subject to trial by court martial under the laws in force prior to the enactment of this title [said sections]. Precedence shall be given by courts to the trial of

cases arising under this title [said sections], and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title [sections 451, 453, 454, 455, 456 and 458 to 471 of this Appendix], or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title [said sections], or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title [said sections] or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000

or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.

(c) The Department of Justice shall proceed as expeditiously as possible with a prosecution under this section, or with an appeal, upon the request of the Director of Selective Service System or shall advise the House of Representatives and the Senate in writing the reasons for its failure to do so. (June 24, 1948, ch. 625, title I, § 12, 62 Stat. 622; Aug. 30, 1965, Pub. L. 89-152, 79 Stat. 586; June 30, 1967, Pub. L. 90-40, § 1(11), 81 Stat. 105.)

AMENDMENTS

1967—Subsec. (a), Pub. L. 90-40, § 1(11)(a), struck out requirement that a request of the Attorney General precede the granting of precedence to the trial of cases arising under this title and added provision that appeals from a decision or decree of any United States District Court or United States Court of Appeals take precedence over all other cases pending before the court to which the case has been referred.

Subsec. (c). Pub. L. 90-40, § 1(11)(b), added subsec. (c).

1965—Subsec. (b)(3). Pub. L. 89-152 prohibited a person from knowingly destroying or knowingly mutilating any registration certificate or other prescribed certificate.

CROSS REFERENCES

Conviction of crime as ground for exemption from service, see section 456 of this Appendix.

Refusal to give preference to orders or to manufacture supplies, see section 468 of this Appendix.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 451, 453, 454, 455, 456, 459, 460, 461, 463, 464, 465, 466, 467, 469, 470 of this Appendix.

32 Code of Federal Regulations, Section 1641.7(a):

§ 1641.7 *Reporting by registrants of their current status.*

(a) It shall be the duty of every classified registrant to keep his local board currently informed of his occupational, marital, family, dependency, and military status, of his physical condition, of his home address, and of his receipt of any professional degree in a medical, dental, or allied specialist category. Every classified registrant shall, within 10 days after it occurs, report to his local board in writing every change in such status and in his physical condition and home address and his receipt of any such professional degree.

(b) A classified registrant shall submit to his local board in writing all information which the local board may at any time request from him concerning his occupational, marital, family, dependency, or military status or his physical condition or his receipt of a professional degree. The registrant shall submit such information to his local board within 10 days after the date on which the local board mails him a request therefor, or within such longer period as may be fixed by the local board.

[E.O. 10735, 22 F.R. 8288, Oct. 22 1957]

## STATEMENT OF CASE.

In September 1967, the Petitioner made application for membership in the Illinois National Guard by filling out certain forms at an armory in Chicago (Rec. 39, 40). The enlistment process was not completed and Petitioner was never inducted into the National Guard.

On December 4, 1967, Petitioner's local draft board was notified mistakenly that Petitioner had enlisted in the Illinois National Guard on November 29, 1967, and was presently a member of the Illinois National Guard expected to depart fror six months' active duty in January of 1968. Pursuant thereto, Petitioner was reclassified and granted a I-D deferment as a qualified member of a reserve component (Rec. 5, 6).

On January 16, 1968, Petitioner went to his local board for the purpose of giving notice of a change of his address (Rec. 43). He spoke to a woman clerk at the local board, told her that his classification was I-D and, in response to her questions, he told her that he did not attend any National Guard meetings and had not gone for his six months duty because he had not been sworn in as yet (Rec. 44, 91, 93, 94). In the course of the next several years, Petitioner lived at five different locations and, each time he moved, he notified his local board of his change of address (Rec. 50, 51).

From time to time, Petitioner called the National Guard Armory to find out when he was to be inducted and when his active duty service would begin (Rec. 80,

81, 82, 89, 90). On May 20, 1968, he visited the Armory in person to inquire as to when his induction would take place (Rec. 106, 107, 111).

On August 8, 1968, Petitioner was called in and interviewed by agents of the Federal Bureau of Investigation about his draft status. He told the two interviewing FBI agents that he had heard nothing from the National Guard after sending in the enlistment form, although he had been advised at the time that he procured the form that he would be contacted shortly after he submitted it. He told the FBI agents that he had never attended any drill at the 178th Infantry Regiment located at the (Chicago South Side) Armory and could not explain how he was a member of the Illinois National Guard (Opinion of Court below, Appendix 2a).

During the August 8, 1968, interview with the FBI agents, Petitioner restated his belief that he was a member of the Illinois National Guard (Rec. 132).

On December 17, 1968, Petitioner was arrested by agents of the Federal Bureau of Investigation and he was charged with having violated the provisions of United States Code, Title 50 Appendix, Section 462, by failing to report to his local draft board that he was not a member of the Illinois National Guard. The date of the offense was alleged to have been January 2, 1968.

On January 27, 1969, the Government offered to drop prosecution if the Petitioner would voluntarily enter into the military service. Petitioner accepted the offer and applied for voluntary induction.

On August 12, 1969, before Petitioner was inducted, his wife gave birth to a child. He wrote to his local board

on September 1, 1969, stating he was classified I-D December 1967, which "I then thought I was on a waiting list to be inducted into the National Guard." He advised the board that in December 1968 he had been "picked up by the FBI, which confiscated his I-D classification card." He added that his wife had given birth to their baby and concluded the letter by asking to be informed of his present draft classification. On September 8, 1969, his local board advised him that his present draft classification was still I-D.

On September 16, 1969, in response to an inquiry, the Illinois National Guard wrote the Illinois State Director of the Selective Service System that the Petitioner had never been a member of the Board. That examination promptd the State Director to instruct Petitioner's local board to reopen his classification. On December 9, 1969, Petitioner was reclassified I-A and declared to be delinquent because of his alleged failure to tell his local board that he was not actually a member of the Illinois National Guard. In late December, Defendant wrote his local board stating he had, in August and in December 1968, told the Federal Bureau of Investigation that he was not in the National Guard, but was only on a waiting list.

On January 10, 1970, Defendant sent a completed current information questionnaire to his local board advising that he was married and a father, and that his wife and a five month old son were solely deepndent on him. This was filed in an unsuccessful effort to secure a III-A classification.

On February 27, 1970, the Deputy Illinois State Director of the Selective Service wrote the United States Attorney for the Northern District of Illinois as follows:

"This Headquarters certainly does not agree that the registrant should be eligible for class III-A. If the board had not had false information concerning his membership in the National Guard, he would have been processed for induction long before his marriage and eligibility for Class III-A (fatherhood). This Headquarters urges your office to insist on his applying for voluntary induction or face prosecution." (Opinion of Court below, Appendix 4a).

The indictment on which Petitioner's conviction is based followed on September 24, 1970.

On May 1, 1972, Petitioner was tried and convicted of the offense by District Judge Frank McGarr, who found that a crime had occurred on August 8, 1968. Judge McGarr said:

> Without finding it necessary to determine any date when the defendant could no longer reasonably believe that he had been accepted and was a member of the National Guard, and therefore that the Selective Service I-D status was an appropriate one and that he had no obligation to report a change of circumstances to the Board, it is possible to seize upon or fix the date in August of 1968 when he was called for an interview by the FBI, and on and after that date his asserted belief that he was still a member of the National Guard, or somehow had a relationship with the National Guard which justified his I-D status and that he might continue legally to enjoy it without contact with the board is a belief on the part of the defendant that is no longer tenable.
>
> This creates the problem, however that the indictment charges him with a wilful failure to report a change of status on January 2, 1968; where it seems to me clear beyond a reasonable doubt that he had

a fact he was obligated to report, only on or about the date of the interview in August of 1968. (Statement of District Judge, Appendix 10a).
Petitioner was sentenced to three years imprisonment.

The United States Court of Appeals, in upholding the judgment of conviction, stated:

> The District court properly concluded that the evidence showed he had been given no active duty nor any of the incidents of active duty in the National Guard after his December 13, 1967, I-D classification. At the latest, defendant knew by the time of his August 1968 FBI interview that he was not a member of the Guard. At trial defendant admitted telling the FBI at that time that he was not a Guard member but only on the waiting list. Since he did not so inform his local board within 10 days thereafter, as required by the regulations, he was plainly guilty. (Opinion of Court below, Appendix 8a).

## BASIS OF FEDERAL JURISDICTION OF THE FIRST INSTANCE.

Jurisdiction of District Court of the offense against the laws of the United States (Title 50, United States Code, War and National Defense, Section 462 was invoked under Title 18, United States Code, Section 3231, and Jurisdiction of the Court of Appeals to review the judgment of the District Court was invoked under Title 28, United States Code, Section 1291.

## REASONS FOR ALLOWANCE OF THE WRIT.

### I.

**PETITIONER HAS BEEN ERRONEOUSLY ADJUDGED TO BE CRIMINALLY LIABLE FOR THE MISTAKES AND INACTION OF THE NATIONAL GUARD AND THE LOCAL BOARD. THE GOVERNMENT HAS FAILED TO PROVE ANY CRIMINAL INTENT IN PETITIONER'S FAILURE TO REPORT THE FACTS IN HIS POSSESSION ON AUGUST 8, 1968 FROM WHICH THE DISTRICT JUDGE DREW THE INFERENCE THAT HE THEN KNEW THAT HE WAS NOT ENTITLED TO THE I-D CLASSIFICATION. A REASONABLE DOUBT EXISTS OF PETITIONER'S GUILT.**

> "Knowingly failing to perform a statutory duty requires the usual criminal intent." *United States* v. *Hoffman* (C.A.2) 137 F. 2d 416, 419.

The District Court and the appeals court have found that Petitioner learned something on August 8, 1968 which subjects him to criminal prosecution for failure to report what he learned to his Local Board. What happened on August 8, 1968 was an interview of Petitioner, conducted by two FBI agents, in which, it was found by the courts, Petitioner acquired knowledge of the fact that he was not a member of the National Guard.

The finder of fact at the trial stage utilized tortured reasoning to determine that guilty knowledge on the part of Petitioner occurred on August 8th, 1968. The court below, in brushing aside the method by which the August 8th date was determined, found that "the specific date was not the essence of the offense."

**The nature of the "crime" of which Petitioner is convicted is that he did not report facts from which it might be suspected that the I-D classification was, should not have been given, or at least not continued, within 10 days from August 8, 1968. Arbitrarily selecting August 8, 1968, or any other date for that matter, does not make such chosen date, *ipso facto,* the day on which *mens rea* can be said to have occurred. This Alice in Wonderland approach ("This is the date because I say it's the date"), coupled with a finding that the specific date is not important, served to deny the Petitioner his right of due process.**

It was the National Guard, not the Petitioner, who notified the Local Board that Petitioner was a member of the National Guard in December, 1967. It was the Local Board that reclassified him I-D pursuant to that notification. The evidence is not controverted, and the District Judge found that there was no showing to the contrary, that Petitioner believed that he was a member of the National Guard at least until the August 8, 1968 interview with agents of the Federal Bureau of Investigation. One of those interviewing agents testified that, even then, Petitioner maintained that he was a member of the National Guard (Rec. 132). It was not until September 16, 1969 that the National Guard informed the Selective Service System that Petitioner was not a member of the National Guard.

Petitioner's testimony stands uncontroverted that he had told a Clerk at the Local Board in January, 1968, that his classification was I-D and that he had not been sworn in by the Guard as yet and had not attended any meetings or performed his six months duty (Rec. 44, 91, 93,

94). His testimony is also uncontroverted that from time to time he had inquired of the Guard when he would be inducted and when his active service would begin (Rec. 80-82, 89-90, 106-107, 111). He always reported his changes of address.

What possible criminal intent could the Petitioner have had in failing to report to his Local Board within 10 days after the FBI interview? He did not tell the agents that he had attended meetings of the Guard or performed any Guard duties. He did not attempt to mislead them in anyway.

Petitioner's conduct after he was arrested on December 17, 1968 lends further weight to the absence of any criminal intent on August 8, 1968, and 10 days thereafter. On January 27, 1969 he accepted the Government's offer to drop prosecution if he would voluntarily enter military service. He applied for voluntary induction—but inaction of the Selective Service System found him still a civilian and still classified I-D when he inquired in early September 1969.

The record is silent as to why the National Guard failed to complete its induction of Petitioner, as well as to why the Selective Service System failed to induct him after he had applied for voluntary induction.

Petitioner stands condemned as a person who, with no criminal intent neglected to perform a useless act, and the act apparently believed to have been required of him was to notify his Local Board that he was not a member of the National Guard when both he and the National Guard said that he was a member and he believed that he was. He stands condemned to three years imprison-

ment primarily because of the mistakes and inaction of the National Guard and the Selective Service System.

This Honorable Court should grant certiorari and correct the unfair conviction of the Petitioner, especially in the light of and in conjunction with the reasons for allowance of the writ that follow herein. Petitioner has been denied due process in a blatant fashion in this unusual case that goes against the grain of common notions of fairness in criminal cases in federal courts.

## II.

**THE JUDGMENT OF CONVICTION IS VOID FOR THE REASON THAT IT IS PREDICATED UPON AN INDICTMENT THAT DOES NOT CHARGE AN OFFENSE AGAINST THE LAWS OF THE UNITED STATES.**

The indictment charges that the Petitioner failed to perform a duty required of him under the Military Selective Service Act "by failing and neglecting to report to his local draft board the fact that he had not become by enlistment, a member of an organized unit of the Army National Guard. . . ."

The applicable statute imposes no such duty. However, the statute does require the performance of any duty required of him under rules, regulations or directions made pursuant to Title 50.

The federal regulation as to registrant's duty to report to his local board is 32 Code of Federal Regulations, Section 1641.7(a); that regulation requires, inter alia, that every classified registrant shall, within 10 days after it occurs, report to his local board in writing every change in his military status.

**The indictment fails to allege the following essential elements of the crime apparently sought to be charged and the "charge" of which Petitioner was found guilty.**

1. **That Petitioner had a particular military status;**
2. **That a change in his military status occurred; and**
3. **That he failed to report that change within 10 days after it occurred.**

**Thus, the indictment fails to charge an offense against the laws of the United States. And this invalidity remained after the evidentiary amendment to the indictment by way of proof of a different date of the purported offense (August 8, 1968 instead of January 2, 1968 as alleged in the indictment) as the date that Petitioner's supposed duty to report began. There is no allegation that Petitioner's military status changed on August 8, 1968, or any other date.**

> "The general and, with few exceptions, of which the present case is not one, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly, and not inferentially or by way of recital." *United States* v. *Hess*, 124 U.S. 483, 8 S. Ct. 571, 31 L. Ed. 516.

Conviction upon a charge not made is a sheer denial of due process. *Thornhill* v. *Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; *DeJonge* v. *Oregon*, 299 U.S. 353, 362, 81 L. Ed. 278, 282, 57 S. Ct. 255.

## III.

**THE JUDGMENT OF CONVICTION IS VOID BECAUSE THE EVIDENCE FAILS UTTERLY TO ESTABLISH ESSENTIAL ELEMENTS OF THE CRIME SOUGHT TO BE CHARGED AND PROVED.**

Petitioner was convicted, ultimately, of having failed to report to his local board within 10 days after August 8, 1968 that he was not a member of the Illinois National Guard. There is no vestige of evidence in the record that Petitioner was at any time a member of the Illinois National Guard and no evidence that there was any change in his military status on August 8, 1968. The evidence is clear that his military status was exactly the same on August 8, 1968 as it was on December 4, 1967 when the National Guard erroneously informed the Local Board that he was a member of the National Guard. Therefore, the record is void of proof that the Petitioner failed or neglected to perform the duty required of him under 32 Code of Federal Regulations 1641.7(a) to report on August 8, or within ten days thereafter that there had been a change in his military status.

Just as a conviction upon a charge not made would be sheer denial of due process, so it is a violation of due process to convict and punish a man without evidence of his guilt. *Thompson* v. *Louisville*, 362 U.S. 100, 80 S. Ct. 624, 4 L. Ed. 2d 654. *Johnson* v. *Florida*, 391 U.S. 596, 20 L. Ed. 2d 838, 88 S. Ct. 1713.

## IV.

**THERE IS A FATAL VARIANCE BETWEEN THE FACTS ALLEGED IN THE INDICTMENT AND THE PROOF UPON THE TRIAL.**

The indictment alleges that on or about January 2, 1968, Petitioner failed to report that he was not a mem-

ber of the National Guard. Assuming that the indictment states an offense against the laws of the United States, the proofs received at trial are that Petitioner failed to report that he was not a member of the National Guard within 10 days after August 8, 1968. The District Judge found specifically that Petitioner committed no offense on the date alleged in the indictment, but that Petitioner committed an offense within 10 days after August 8, 1968. The variance is fatal.

It is fundamental that due process is denied where the trial court or prosecuting attorney changes an indictment without the resubmission of the case to the grand jury. *In Re Bain,* 121 U.S. 1, 7 S. Ct. 781, 30 L. Ed. 849. It is equally fundamental that a conviction based upon evidence of a charge not contained in the indictment is obtained in violation of the defendants right of due process. *Stirone* v. *United States,* 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2nd 252. A conviction obtained by proof of a charge not alleged in the indictment is invalid because of the variance between the charge and the proof. *Cole* v. *Arkansas,* 333 U.S. 196, 68 S. Ct. 514.

Respectfully submitted,

HOWARD T. SAVAGE
Suite 1015, 100 N. LaSalle Street
Chicago, Illinois 60602
AC 312 - STate 2-2131

and

ADAM BOURGEOIS
Suite 1000, 188 W. Randolph Street
Chicago, Illinois 60601
AC 312 - 332-1413

*Attorneys for Petitioner*

## APPENDIX

# In the United States Court of Appeals

## For the Seventh Circuit

Chicago, Illinois 60604
Heard February 22, 1973
May 16, 1973

Before

Hon. LATHAM CASTLE, *Senior Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

No. 72-1676 vs.

ROGER MUSCOLINO,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70 CR 466
FRANK J. MCGARR, *Judge*

ORDER

In September 1970, defendant was indicted for willfully failing to notify his local draft board "on or about January 2, 1968" that he did not enlist in the Illinois National Guard, a fact of which he was required to inform the local board within 10 days of his knowledge thereof. 32 C.F.R. §§ 1641.7(a) and 1642.2. This was said to vio-

late 50 U.S.C. App. § 462. After a bench trial, he was convicted of this offense and received a 3-year imprisonment sentence from which he has appealed.

On December 14, 1966, defendant, who had been classified I-S, was reclassified I-A by his local board in Chicago. In September 1967, he filled out an Illinois National Guard enlistment form he had obtained at an armory on the South Side of Chicago. On December 4, 1967, his local board received a DD Form 44 for "Record of Military Status of Registrant." This form was purportedly signed on November 29, 1967, by Capt. Laddie Hodges, Jr., and falsely reported that as of that date defendant was a private in the National Guard and was scheduled for January 15, 1968, departure for six months' active duty. Defendant stipulated to the falsity of the document. In reliance on the false information, the local board reclassified defendant I-D on December 13, 1967. This classification is a deferment for, *inter alia*, a qualified member of a reserve component.[1]

On August 8, 1968, defendant was interviewed at the Chicago office of the Federal Bureau of Investigation. Defendant told the two interviewing FBI agents that he heard nothing from the National Guard after sending in the enlistment form, although he was advised when he procured the form that he would be contacted shortly

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[1] The SSS Form 110 notifying defendant of his I-D classification has the following admonition:

"The law requires you to notify your local board in writing within 10 days after it occurs, (1) of every change in your • • • military status, and (2) of any other fact which might change your classification."

after submitting it. He told the FBI "that he never attended any drill at the 178th Infantry Regiment located at the * * * [Chicago South Side] Armory and could not explain how he was a member" of the Illinois National Guard. Defendant never went on active duty with the Illinois National Guard nor attended its meetings. He never took an oath and was not issued National Guard clothing or an identification card.

On September 1, 1969, defendant wrote his local board, stating he was classified I-D December 1967, while "I then thought I was on a waiting list to be inducted into the National Guard." He advised the board that in December 1968 he had been picked up by the FBI,[2] which confiscated his I-D draft classification card. He added that his wife gave birth to their baby son on August 12, 1969, and that he was the only support of his family. He concluded the letter by asking to be informed of his present draft classification. On September 8, 1969, his local board advised him that his present draft classification was still I-D.

On September 16, 1969, in response to an inquiry, the National Guard wrote the Illinois State Director of the Selective Service System that defendant had never been a member of the Guard, prompting the State Director to instruct defendant's local board to reopen his classification. On December 9, 1969, defendant was reclassified I-A and declared delinquent because of his failure to tell his local board that he was actually not a member of the

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[2] This was his second contact with the FBI. He was arrested on December 19, 1968.

Illinois National Guard. In late December defendant wrote his local board admitting he had in August and in December 1968, told the FBI he was not in the National Guard but only on a waiting list.

On January 10, 1970, defendant sent a completed current information questionnaire to his local board advising that he was married and a father and that his wife and 5-month-old son were solely dependent on him. This was filed in an unsuccessful effort to secure a III-A classification.

On February 27, 1970, the Deputy Illinois State Director of the Selective Service System wrote the United States Attorney for the Northern District of Illinois as follows:

> "This Headquarters certainly does not agree that the registrant should be eligible for Class III-A. If the board had not had false information concerning his membership in the National Guard, he would have been processed for induction long before his marriage and eligibility for Class III-A (fatherhood). This Headquarters urges your office to insist on his applying for voluntary induction or face prosecution."

This indictment followed on September 24, 1970.

Defendant first contends that his Sixth Amendment right to a speedy trial was denied by the span of 22 months between his December 19, 1968, arrest and his indictment. As they present themselves in the particular circumstances of this case, four factors must be assessed and balanced to determine whether the right was denied.

They are: the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Barker* v. *Wingo*, 407 U.S. 514, 530. A 22-month delay is of sufficient length to inquire into the other factors. The record shows that the Government deferred prosecution because on January 27, 1969, defendant accepted the Government's offer to go into the service instead of face prosecution. Thus defendant applied for voluntary induction.

At no time after January 27, 1969, did defendant attempt to expedite his indictment or seek an immediate trial. If, as defendant contends, he thought himself ineligible for voluntary induction upon the birth of his child in August 1969, he should have requested a prompt trial soon after. If he was really concerned about "hav]ing] the ax of criminal prosecution hang over his head, clouding his life and dampening his spirit," he likely would have done so. *Id.* at 531. Defendant was represented by counsel, indeed the same retained counsel, from December 18, 1968. Although the Supreme Court abrogated the demand-waiver rule in *Barker* v. *Wingo, supra*, it also stated: "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defedant to prove that he was denied a speedy trial." *Id.* at 532.

Aside from the anxiety and concern defendant supposedly suffered during the pretrial delay (see *id.* at 532), the only other prejudice defendant claims to have suf-

fered is the loss of the option to enter the service on a voluntary induction basis. Apparently relying on 32 C.F.R. § 1630.4(a)[3] (defense counsel did not bother to cite any particular regulation), defendant contends that once his child was born on August 12, 1969, he became entitled to a III A classification, thus prohibiting his voluntary induction. But this claim goes not to prejudice suffered from delay in commencing trial but to prejudice suffered because the Selective Service System did not act quickly to induct him. Even so, defendant made no effort to precipitate a prompt induction, and he did not know when he applied for voluntary induction that his wife was pregnant. More fundamentally defendant's argument is infirm because he was never classified III-A. His claim for a III-A deferment (not made until January 10, 1970) was denied by his local board, and affirmed by the Appeal Board, so that he was retained in classification I-A, in which he had been placed on December 9, 1969. It ill behooves defendant to argue that he wanted to be voluntarily inducted and would gladly have submitted at all times, even after his son's birth,[4] and at the same time argue, in effect, that his draft board erroneously determined him to be subject to voluntary induction. It is all the more peculiar because in making application for vol-

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[3] That regulation provides:

"When a man files an Application for Voluntary Induction (SSS Form 254) under the provisions of § 1630.1, he shall be classified as soon as possible and placed in a class available for military service unless:

"(a) Disregarding all other grounds for deferment, he would be classified in Class II-A, Class II-C, or Class III-A;"

[4] This argument is made suspect by the very fact that defendant sought a III-A classification on January 10, 1970.

untary induction defendant agreed unqualifiedly to enter the service and he waived all personal appearance and appeal rights if classified as available for service. SSS Form 254. The record strongly suggests defendant was content to take whatever advantage he could from the delay in which he had acquiesced. *Barker* v. *Wingo, supra,* at 535.

In sum, the scales are ponderously tilted against finding a constitutional deprivation of a speedy trial and we therefore reject defendant's claim of Sixth Amendment violation.

Although the indictment charged that "on or about January 2, 1968," defendant failed to advise his local board that he did not enlist in the Illinois National Guard, Judge McGarr found it clear beyond a reasonable doubt that defendant knew he was obligated to report non-membership in the Illinois National Guard when he was called for the first FBI interview in August 1968. 32 C.F.R. §§ 1641.7(a) and 1642.2 imposed a continuing duty upon defendant to report his current military status to his local board. Therefore, proof of his violation of that duty between his December 13, 1967, I-D classification and his December 9, 1969, I-A reclassification supports the conviction. *United States* v. *Bruckman,* 466 F. 2d 754 (7th Cir. 1972).

Defendant has not shown that he was prejudiced by the variance between the January 2, 1968, date in the indictment and the proof that the offense was committed in August 1968. The specific date was not the essence of the offense. Both the Government's trial brief and its re-

sponse to defendant's bill of particulars advised him of the Government's position as to the August 1968 date, so that he was not misled in preparing his defense. *Bruckman, supra* at 758.

We have reviewed the evidence in the light most favorable to the Government, as required, and conclude that it was sufficient to prove defendant's guilt beyond a reasonable doubt. The district court properly concluded that the evidence showed he had been given no active duty nor any of the incidents of active duty in the National Guard after his December 13, 1967, I-D classification. At the latest, defendant knew by the time of his August 1968 FBI interview that he was not a member of the Guard. At trial defendant admitted telling the FBI at that time that he was not a Guard member but only on the waiting list. Since he did not so inform his local board within ten days thereafter, as required by the regulations, he was plainly guilty.

Finally, defendant argues that the 3-year imprisonment sentence was improper. The sentence was well below the 5-year maximum and in line with other Selective Service sentences imposed in the Northern District of Illinois. Being within the sound discretion of the trial judge, the sentence will not be disturbed. *United States* v. *Fallon*, 407 F. 2d 621, 624 (7th Cir. 1969), certiorari denied, 395 U.S. 908.

Judgment of conviction affirmed.

*(Statement of District Judge)*

**STATEMENT OF THE DISTRICT JUDGE:**
**Record, page 151:**

**The Court: I think this story told by the defendant here, and his father, starts as a rather typical and understandable family situation of a son being faced with the Selective Service classification which suggests him in an induction. The father thinking of possible service in the Guard and making inquiry, and the defendant doing what, as a citizen he had a right to do, and that was inquiring as to whether he might get into the National Guard. I find no suggestion of anything inappropriate or reprehensible under those circumstances.**

**It is possible to believe under the circumstances, or at least the government has not proved beyond a reasonable doubt that I cannot believe or should not believe that Roger Muscolino knew that he enjoyed a 1-D status as of the date that he was so notified by his Selective Service Board, which he might have believed was the result of the National Guard acceptance of his application for membership. So up until the date of the issuance of the 1-D status, and his enjoyment of that status for a period thereafter, I doubt that the government has demonstrated beyond a reasonable doubt that he could not have genuinely believed that he had been accepted by the National Guard, and that the 1-D status was the result thereof, however, this belief, I do not think, could reasonably survive the ensuing circumstances of no notice from the National Guard itself, even though the presumption that the draft board had received some notice might have existed in his mind.**

*(Statement of District Judge)*

No active duty, or none of the incidents of active duty, so that it was impossible for the belief of an acceptance by the National Guard to survive for any length of time in view of the lack of activity thereafter on the part of the Guard.

Without finding it necessary to determine any date where the defendant could no longer reasonably believe that he had been accepted and was a member of the National Guard, and therefore, that his Selective Service 1-D status was an appropriate one, and that he had no obligation to report a change of circumstances to the Board, it is possible to seize upon or fix upon the date in August of 1968 when he was called for an interview by the FBI, and on and after that date is asserted belief that he was still a member of the National Guard, or somehow had a relationship with the National Guard which justified his 1-D status and that he might continue legally to enjoy it without contact with the board is a belief on the part of the defendant that is no longer tenable.

This creates the problem, however, that the indictment charges him with a wilful failure to report a change of status on January 2nd, 1968; where it seems to me clear beyond a reasonable doubt that he had a fact he was obligated to report, only on or about the date of the interview in August of 1968.

I have had called to my attention in the government's pretrial brief, and I accept as an appropriate statement of the law, the fact that the failure to report a change of status under the section involved in here is a continuing obligation, and that the government may prove that

change of status and the obligation to report arising at any time between the date alleged in the indictment, and that is the date of the offense alleged in the indictment, and the date of the indictment itself.

The defendant has not has an opportunity to respond to that assertion of a principle of law, and I intend to give it to them if they seek it, and I make this statement for the record in order that the record may show that my finding is based at this moment at least on an acceptance of the government's assertion of the continuing obligation to report and the fact that the January 2nd date in the indictment is one which I may regard somewhat flexible under the circumstances.

On that basis I find the defendant Roger Muscolino guilty as charged in 70 CR 466, a charge of violation of Title 15 Appendix, United States Code, Section 462.

The legal qeustion which I have just averted to may be raised in the post-trial motion if the defendant sees fit to do so. In the meantime, however, I do intend, on the basis of this finding of guilty, to order a presentence investigation and set the matter for disposition.

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